McCrometer, Division of Ametek, Inc. *and* **United Steelworkers of America, AFL-CIO.** Case 21-CA-19637

May 14, 1982

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On November 17, 1980, the Regional Director for Region 21 of the National Labor Relations Board issued a complaint and notice of hearing in the above-entitled proceeding, alleging that Respondent has engaged in and is engaging in certain unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Subsequently, Respondent filed an answer to the complaint admitting in part and denying in part the allegations in the complaint.

On February 11, 1981, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment. Thereafter, on February 23, 1981, the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. Respondent subsequently filed a response to the Notice To Show Cause.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Upon the entire record in this proceeding, the Board makes the following:

Ruling on the Motion for Summary Judgment

In its answer to the complaint and in its response to the Board's Notice To Show Cause, Respondent admits that it has refused to bargain with the Union. Respondent contends, however, that the Board's certification of the Union as the exclusive collective-bargaining representative of the unit employees in the underlying representation case was improper and that Respondent was denied due process of law in the course of the certification process. Specifically, Respondent contends that it has been denied due process because management representatives were not interviewed regarding the status of Jack E. Baker, whom the Regional Director found to be ineligible to vote, and Respondent was not granted a hearing regarding the Union's challenges to certain ballots. As further explained below, we find merit in Respondent's contention that the Union's challenges to the ballots of Jack E. Baker and Don Barron should not have been resolved without a hearing. Accordingly, we shall deny the General Counsel's Motion for Summary Judgment and direct the Regional Director to conduct a hearing on these challenges.

The record in this case reveals that on May 14, 1980, the Union and Respondent entered into a Stipulation Upon Consent Election. On June 10, 1980, an election among Respondent's employees was conducted by the Board. The tally of ballots shows that a total of 25 ballots was cast; 12 votes were cast for the Union, 10 votes were cast against the Union, and 3 votes were challenged. The challenges were resolved without a hearing by the Regional Director for Region 21 as follows:

The ballot of Rodney Schug was challenged by the Board agent because Schug's name did not appear on the voter eligibility list. The Regional Director found that Schug was ineligible to vote and sustained the challenge. Schug's ballot is not at issue in this proceeding.

The ballots of Jack E. Baker and Don Barron were challenged by the Union on the ground that they were not employees in the bargaining unit. The Regional Director found Baker's duties and interests to be markedly different from those of other bargaining unit employees, that he was a "technical" employee, and that he was, therefore, ineligible to vote. The challenge to Barron's ballot was not resolved by the Regional Director, since Baker's ineligibility removed the possibility that Barron's ballot could affect the results of the election.

On August 22, 1980, Respondent filed exceptions to the Regional Director's report. On September 25, 1980, the Board adopted the findings and recommendations of the Regional Director and issued a Decision and Certification of Representative in Case 21-RC-16364.[1]

Upon reconsideration, we now believe that said certification was improvidently granted. As noted above, the Regional Director chose not to conduct a hearing on the Union's challenges to the ballots of Jack E. Baker and Don Barron, but rather to sustain the challenges to Baker on the basis of evidence apparently gathered from the Petitioner during his investigation. Under the circumstances of this case, and in light of Respondent's offer to produce witnesses to support its contention that Baker and Barron shared a sufficient community of interest with other unit employees so as to require their inclusion in the unit and that the challenges to their ballots should be overruled, we find that compliance with the Board's Rules and Regulations,

[1] Not reported in volumes of Board Decisions.

Series 8, as amended, Section 102.69, requires that a hearing be held as to those allegations.

In opposition to the challenges to the ballots of Baker and Barron Respondent submitted a letter dated June 23. That letter notes that these two employees were permitted to vote in a previous election involving this unit and the same petitioning union. Further, Respondent specifically identified the supervisor of both Baker and Barron in its letter. It also made a clear and unequivocal offer to identify other witnesses and to cooperate in procuring affidavits.

Under these circumstances, we conclude that even if the Union made an adequate *prima facie* showing of facts, which, if true, would establish that Baker and Barron were not unit members, Respondent sufficiently rebutted this showing so as to raise substantial and material issues of fact which make a hearing appropriate.

The Board, having duly considered the matter, is of the opinion that there are substantial and material issues of fact and law which may best be resolved at a hearing before an administrative law judge.

ORDER

It is hereby ordered that the General Counsel's Motion for Summary Judgment be, and it hereby is, denied.

IT IS FURTHER ORDERED that the proceeding in Case 21-RC-16364 be reopened and consolidated with the proceeding in Case 21-CA-19637 for the purpose of receiving evidence regarding the eligibility of Jack E. Baker and Don Barron.

IT IS FURTHER ORDERED that the proceeding be, and it hereby is, remanded to the Regional Director for Region 21 for the purpose of arranging such hearing and that said Regional Director be, and hereby is, authorized to issue notice thereof.

IT IS FURTHER ORDERED that the Board's Certification of Representative in Case 21-RC-16364 be, and it hereby is, stayed pending completion by the Board of its reconsideration in this proceeding.

MEMBER JENKINS, dissenting:

I dissent from my colleagues' failure to grant the General Counsel's Motion for Summary Judgment.

The Board's Rules and Regulations,[2] as well as the decisions of this Board,[3] require that a hearing be held on challenged ballots only when there exist "substantial and material factual issues" which cannot properly be resolved in the course of an administrative investigation. The burden of showing the existence of such issues rests with the party desiring a hearing. In this case, Respondent has offered no specific evidence of any kind in support of its contention that Baker and Barron are unit employees, other than mere expressions of disagreement with the reasoning and conclusions of the Regional Director. The record clearly shows that Respondent decided not to present affidavits or a list of appropriate witnesses to the Regional Director. Instead, in its letter of June 23, 1980, Respondent stated that such affidavits and list of witnesses could be presented if the Regional Director deemed it "necessary." I cannot agree with my colleagues that this thin statement constitutes the raising of "substantial and material factual issues" necessitating a hearing. In light of Respondent's failure to avail itself of its opportunity to present affidavits and a list of appropriate witnesses to the Regional Director, its claim that it was denied due process and the opportunity to present evidence is without substance.

Neither the Board's Rules and Regulations, nor sound policy, requires the Regional Director to chase down representatives of Respondent when Respondent has chosen not to offer even a list of prospective witnessses. Nor should the Regional Director be required to request affidavits when Respondent has chosen not to present even the glimmer of a *prima facie* showing of substantial and material issues of fact.

It has been long established that it is incumbent upon the party seeking a hearing affirmatively to demonstrate the existence of factual issues which can only be resolved by a hearing and to state with specificity the evidence it intends to present.[4] Absent such specific assertions, the Board is entitled to rely on the administrative investigation and report of the Regional Director. Since Respondent has utterly failed to meet this burden, I believe that my colleagues err in ordering a hearing.

Moreover, our policy in this important area should be clear, well-defined, and consistent. In our previous decisions, we have been guided by the Act's policy of expeditiously resolving questions concerning representation.[5] If we decide to depart from this policy of requiring a hearing on challenged ballots only where the party requesting a hearing comes forward with specific evidence demonstrating substantial and material factual issues,

[2] Rules and Regulations of the Board, Secs. 102.69(c) and (f).

[3] *Trustees of Boston University*, 242 NLRB 110, 111, fn. 4 (1979); *Southwest Color Printing Corp.*, 247 NLRB 917 (1980); *Allis Chalmers Corporation*, 252 NLRB 606 (1980); *AJD Cap Corp.*, Case 5-RC-11018 (May 22, 1980) (not reported in volumes of Board Decisions).

[4] *Allied Foods, Inc.*, 189 NLRB 513 (1971); *Ohio Masonic Home*, 233 NLRB 1004 (1977); *Hydro Conduit Corporation*, 242 NLRB 171 (1979); *Southwest Color Printing Corp., supra*; *N.L.R.B.* v. *Tennessee Packers, Inc.*, 379 F.2d 172 (6th Cir. 1969), cert. denied 389 U.S. 958; *N.L.R.B.* v. *Rewco D.S., Inc.*, 653 F.2d 264 (6th Cir. 1981).

[5] See, e.g., *Trustees of Boston University, supra; Southwest Color Printing Corp., supra.*

we should not do so *sub silentio* and on an *ad hoc* basis where the parties have no way of knowing which policy we will follow.

On September 25, 1980, the Board certified the Union as the exclusive collective-bargaining representative of the unit employees over the objection of Respondent. At that time we had before us and properly rejected all of the arguments which Respondent now raises. It is undisputed that Respondent has refused to recognize and bargain with the Union. Accordingly, the General Counsel's Motion for Summary Judgment should be granted.